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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN RE CATHODE RAY TUBE (CRT) ANTITRUST LITIGATION

This Document Relates to:

Sharp Electronics Corp., et al. *v. Hitachi, Ltd.,* et al., No. 13-cv-1173 SC;

Sharp Electronics Corp., et al. *v. Koninklijke Philips Electronics N.V.*, et al., No. 13-cv-2776 SC;

Sears, Roebuck and Co. and Kmart Corp. v. Technicolor SA, No. 13-cv-05262;

Sears, Roebuck and Co. and Kmart Corp. v. Chunghwa Picture Tubes, Ltd., No. 11-cv-05514;

Target Corp. v. Chunghwa Picture Tubes, Ltd., No. 11-cv-05514; and

Target Corp. v. Technicolor SA, No. 13-cv-05696

Case No. 07-cv-5944 SC
MDL No. 1917

PLAINTIFFS SHARP ELECTRONICS CORPORATION & SHARP ELECTRONICS MANUFACTURING COMPANY OF AMERICA, INC.'S OPPOSITION TO JOINT DEFENSE MOTION IN LIMINE NO. 10 – MOTION TO EXCLUDE EVIDENCE OF ANY ALLEGED CDT PRICE-FIXING CONSPIRACY

Date: None set
Place: Courtroom 1
Judge: Hon. Samuel Conti

[REDACTED VERSION]

Plaintiffs Sharp Electronics Corporation and Sharp Electronics Manufacturing Company of America, Inc. (collectively, "Sharp")[1] respectfully submit this opposition to Joint Defense Motion *in Limine* No. 10 to exclude evidence of any alleged CDT price-fixing conspiracy.

INTRODUCTION

In this case, Sharp alleges that the defendants and their co-conspirators engaged in a long-running conspiracy to reduce competition by fixing, raising, maintaining, or stabilizing the price of CRTs; limiting the production of CRTs; allocating customers or market shares; and/or exchanging information which had the purpose of and resulted in CRTs being priced higher than they otherwise would have been. Because of defendants' illegal conduct, Sharp paid higher prices for CRTs than it otherwise would have. Specifically, Sharp spent over $1.3 billion purchasing "CPTs" (a type of CRT used in televisions) during the relevant time period, and according to Sharp's damages expert, paid over $146 million in overcharges on those purchases.

Defendants, in their motion, seek to draw a line between, on the one hand, "alleged misconduct regarding CDTs" (CRTs used in monitors), and, on the other hand, "an alleged CPT conspiracy" (Mot. at 2), arguing that Sharp should be precluded from using "evidence regarding CDTs" on grounds of relevance and undue prejudice. Defendants' motion thus is based on the premise that Sharp has pled only a CPT conspiracy, or that there is no evidence regarding the alleged CRT conspiracy that involves both CPTs and CDTs. Neither is true.

First, Sharp has alleged a single CRT conspiracy (*see generally* Sharp Second Amended Compl. ("SAC") MDL Dkt. No. 2621), and defendants may not "improperly re-characterize the plaintiffs' allegations" to describe multiple conspiracies. *In re Vitamins Antitrust Litig.*, 209 F.R.D. 251, 265 (D.D.C. 2002). In this regard, it is of no consequence that Sharp's purchases

[1] Though defendants' motion refers almost exclusively to Sharp, defendants also argue, in a footnote, that both Target and Kmart should similarly be precluded from offering CDT evidence. (Mot. at 2 n.1.) Plaintiffs Target and Kmart respectfully submit that defendants' failure even to attempt to link up their motion *in limine* to the unique claims of Target and Kmart provides a sufficient basis to deny the motion with respect to Target and Kmart. Otherwise, plaintiffs Target and Kmart join in the arguments set forth herein by Sharp.

Further, Kmart points out that its affiliate company, Sears (Kmart and Sears are jointly owned), did purchase CDT Products. Given that Kmart and Sears filed their complaint together and are represented by the same attorneys, defendants' suggested relief would be impossible to implement at trial as to Kmart.

were limited to CPTs, as Sharp has not "alleged multiple conspiracies," but instead "alleged a single price fixing conspiracy." *In re Vitamins Antitrust Litig.*, 209 F.R.D. at 265. As plaintiff, Sharp has the right to frame the allegations in its complaint as it did, and defendants may not seek to exclude evidence on the basis that they do not agree with those allegations.

Second, defendants' unsupported assertion that evidence of CDT misconduct is entirely separate from evidence of CPT misconduct is just wrong. Much of the conduct is one and the same. [redacted] Even after the meetings were "separated," they were often still held back-to-back and in the same location. And irrespective of when the meetings occurred and whether they were in the same room, defendants continued to discuss both products together as a part of the written conspiratorial communications that were not destroyed or deleted.

Evidence of defendants' misconduct regarding CDTs plainly is relevant under Rule 401 to the existence of a conspiracy involving both CDTs and CPTs. Defendants' conclusory prejudice and waste-of-time arguments are both meritless. Evidence concerning defendants' conspiratorial activities and their efforts to avoid detection may be damaging to defendants, but that is precisely because such evidence is relevant. Defendants have also made no showing whatsoever that including CDT evidence, much of which is intertwined with CPT evidence, would waste any time – much less the substantial amount of time needed to overcome its relevance. Defendants' motion should thus be denied.

ARGUMENT

A. Evidence Pertaining to Defendants' Misconduct Regarding CDTs Is Squarely Relevant Under Fed. R. Evid. 401

Sharp will show at trial that defendants and their co-conspirators engaged in a long-running CRT conspiracy – a conspiracy that included both CPTs and CDTs. Evidence

concerning defendants' misconduct regarding CDTs is therefore directly probative of the existence of the conspiracy.

Defendants' only argument to the contrary is that Sharp seeks damages for CPT purchases, not CDT purchases, and calculated its overcharge on those CPTs. (Mot. at 2 & n.3.) No matter. The law is clear that a conspiracy can include more than one product or product market. So, for example, in *In re Vitamins Antitrust Litigation*, the court rejected defendants' efforts to divide the alleged single conspiracy into multiple separate conspiracies, even though the products at issue – different vitamins – were "so diverse as to comprise many relevant antitrust markets." 209 F.R.D. at 265. Like here, it was the plaintiffs' allegations of a single conspiracy that controlled, *id.*, because "[a]s the Supreme Court stated: 'the character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts but only by looking at it as a whole.'" *Id.* (quoting *Continental Ore Co. v. Union Carbide & Carbon Co.*, 370 U.S. 690, 699 (1962)); *see also Univac Dental Co. v. Dentsply Int'l, Inc.*, 268 F.R.D. 190, 200 (M.D. Pa. 2010) ("[C]ourts should refrain from looking at only isolated pieces of evidence to prove an antitrust conspiracy."). And though defendants contend that their alleged misconduct relating to CDTs is separate from their alleged misconduct relating to CPTs, "this argument does not provide a basis for complete exclusion of this evidence. Rather, it defines at most a factual issue which must be presented, and weighed, by a jury." *Univac Dental Co.*, 268 F.R.D. at 200. A "motion in limine should not be used to prevent a party from pursuing the theories supporting its causes of action." *Chopourian v. Catholic Healthcare West*, No. S-09-2972, 2011 WL 6396500, at *14 (E.D. Cal. Dec. 20, 2011). Because Sharp has alleged a CRT conspiracy, Sharp is entitled to offer evidence to prove a CRT conspiracy.

Moreover, defendants' contention that their CDT misconduct was entirely separate from their CPT misconduct does not withstand scrutiny. In fact, an extensive body of documentary and testimonial evidence shows the overlap. For example, the formal meetings of the co-conspirators, termed "Glass Meetings" or "GSM" (*see* SAC ¶ 153), could include discussions of both CPTs and CDTs. [redacted]

[redacted] And while the co-conspirators eventually did make an effort to hold CDT and CPT Glass Meetings separately, that effort only confirms the relevance of this evidence. [redacted] In other words, the meetings were separated to help keep the defendants' conspiracy a secret – a fact that plainly is relevant both to proving Sharp's affirmative case and disproving defendants' defenses.

And that is only some of the evidence confirming the relevance of CDT misconduct to Sharp's case. Information exchanges among the co-conspirators frequently included information on both CPTs and CDTs. [redacted]

[redacted] And as is set forth more fully in the Direct Action Plaintiffs' opposition to Thomson Consumer's motion for summary judgment that it did not participate in a CDT conspiracy (*see* MDL Dkt. No. 3236), [redacted][2]

* * *

On this record, defendants' assertion that "alleged misconduct regarding CDTs is not at issue" should be rejected. The evidence pertains to a central element of Sharp's case – the existence of a CRT conspiracy. It easily meets the threshold of having "any tendency to make a fact more or less probable than it would be without the evidence," where that fact is "of consequence in determining the action." Fed. R. Evid. 401. As a result, it is admissible under Rule 401. *See id.*; *see also, e.g.*, *Kalitta Air L.L.C. v. Central Texas Airborne System Inc.*, 547 F. App'x 832, 834 (9th Cir. 2013) (unpublished); *United States v. Dorsey*, 677 F.3d 944, 951 (9th Cir. 2012); *Onyx Pharm., Inc. v. Bayer Corp.*, 863 F. Supp. 2d 894, 900 (N.D. Cal. 2011).

B. Neither Rule 403 Nor Rule 404 Precludes Evidence of Defendants' Misconduct Regarding CDTs

There is also no basis to exclude evidence of defendants' misconduct regarding CDTs under Rules 403 and 404. Defendants' conclusory argument that this evidence will "mislead[]

[2] *See also* Plaintiffs' Opp. to Defendant Thomson Consumer's Mot. for Summary Judgment and Partial Summary Judgment (MDL Dkt. No. 3236); Plaintiffs' Rule 56(d) Supplement to Opp. to Defendant Thomson Consumer's Mot. for Summary Judgment and Partial Summary Judgment (MDL Dkt. No. 3506).

the jury by confusing the issues between the alleged CDT and alleged CPT conspiracies" (Mot. at 3) is unconvincing.[3]

As an initial matter, defendants' reliance on Rule 404(b) is misplaced because misconduct relating to CDTs is not "other bad acts" evidence that would be used to show some propensity by defendants to violate antitrust laws. (Mot. at 3.) As noted above, Sharp did not plead separate CDT and CPT conspiracies; it pled a single CRT conspiracy. Thus, evidence regarding defendants' misconduct with respect to CDTs is evidence of the very conspiracy Sharp alleged. *See United States v. Rizk*, 660 F.3d 1125, 1131-32 (9th Cir. 2011) (holding real estate transactions not specifically named in the indictment "were not 'other acts' subject to Rule 404(b)" because they "were 'inextricably intertwined' with the conspiracy charge," and were offered by the government "to show the full scope of that conspiracy"); *see also Dorsey*, 677 F.3d at 951-52.

Nor is evidence regarding defendants' misconduct with respect to CDTs unfairly prejudicial. "Relevant evidence is inherently prejudicial; but it is only unfair prejudice, substantially outweighing probative value, which permits exclusion of relevant matter under Rule 403." *United States v. Hankey*, 203 F.3d 1160, 1172 (9th Cir. 2000) (internal quotation omitted); *see also, e.g.*, *Durham v. County of Maui*, 742 F. Supp. 2d 1121, 1131-32 (D. Haw. 2010). Defendants have not begun to approach the showing that must be made under Rule 403 to exclude this relevant evidence. As one of the cases on which defendants rely explains, a "bald assertion" of prejudice will not suffice to establish that evidence should be excluded under Rule 403, particularly where, as here, the evidence is probative. *United States v. Dhingra*, 371 F.3d 557, 565-66 (9th Cir. 2004).

Defendants also argue that the introduction of evidence concerning defendants' misconduct with respect to CDTs will "waste the time of the jury and Court" because

[3] In a footnote, defendants assert, without argument or explanation, that "Sharp should also be precluded from introducing evidence relating to SDI's plea agreement, which only concerns CDTs, for the same reasons." (Mot. at 2 n.2.) The admissibility of SDI's plea agreement is separately addressed in the Direct Action Plaintiffs' Opposition to Motion *in Limine* No. 5, and those arguments will not be repeated here. That the plea recites facts relating to misconduct with respect to CDTs, and not CPTs, does not render it less admissible, because, as demonstrated in this opposition, such misconduct is relevant to Sharp's claims.

"[d]efendants will have to spend significant time introducing further evidence and calling additional fact and expert witnesses." (Mot. at 3-4.) But as the sampling of evidence set forth above demonstrates, evidence of defendants' misconduct with respect to CPTs is intertwined with the evidence of defendants' misconduct with respect to CDTs. It is thus not clear what kind of "further" or "additional" evidence defendants expect would be required; they have not even attempted to explain any such evidence here. And even if more evidence were required, defendants must show that the danger of undue delay or a waste of time substantially outweighs the probative value of the evidence. *See* Fed. R. Evid. 403 (emphasis added). Considering the relevance of evidence of defendants' misconduct with respect to CDTs to Sharp's claim of a CRT conspiracy, defendants' unsupported assertions do not suffice. *See* Fed. R. Evid. 403; *see also, e.g.*, *Onyx Pharm., Inc.*, 863 F. Supp. 2d at 900 ("In addition, the fact that Bayer will need to put on additional witnesses to explain and defend its conduct with respect to the same plaintiff, under the same contract, does not lead to the kind of prejudice or potential confusion that substantially outweighs the probative value of this evidence.").

In sum, the evidence that defendants seek to exclude is highly relevant, and the probative value of that evidence is not substantially outweighed by the risk of any unfair prejudice or undue delay. Accordingly, defendants' motion to exclude should be denied.

CONCLUSION

For these reasons, the Court should deny Joint Defense Motion *in Limine* No. 10 to exclude evidence of any alleged CDT price-fixing conspiracy.

DATED: February 27, 2015 By: /s/ *Craig A. Benson*

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